EISENBERG GILCHRIST & CUTT

INTERNAL MEMORANDUM

TO: Bob Gilchrist

FROM: Chris Higley

CLIENT: N/A

SUBJECT: H.B. 161 - Liability of importers of foreign-made goods

DATE: April 17, 2013

INTRODUCTION

Last legislative session, a bill was introduced that sought to enact a new law in Utah that would allow for importers of foreign-made products that are ready for retail sale to be held liable as though the importer were the manufacturer. H.B. 161 (Utah Gen. Sess. 2013). I have been asked to research whether other jurisdictions have enacted similar legislation and, if so, whether their approach is similar to that of H.B. 161.

ISSUES AND BRIEF ANSWERS

MAIN ISSUE: Is there case law or statutory law that supports the proposition of holding importers of foreign-made products liable as though the importer of product were the actual manufacturer?

MAIN ANSWER: Yes. There is both case law and statutory support for enacting H.B. 161. Each state that has addressed the issue has done so in a slightly different manner. However, there are generally two approaches to holding importers liable as manufacturers. First, certain states impose jurisdictional requirements that make courts find that the actual manufacturer is not subject to the jurisdiction of the court. Second, other states allow for importers to be held strictly liable for defective imported products.

SUB-ISSUE A(1): For states that require the court to make jurisdictional findings, are there differences in who carries the burden of establishing, or disproving, jurisdiction?

SUB-ANSWER A(1): Yes. Some states require that the claimant establish that the product manufacturer is not subject to the court's jurisdiction. One state has imposed the duty of establishing the court's jurisdiction over the manufacturer on the product importer.

SUB-ISSUE A(2): For states that require the court to make jurisdictional findings, are there differences in the type of damages that the claimant can recover?

SUB-ANSWER A(2): Yes. One state specifically limits damages recovered against importers to compensatory damages. Other states have no statutorily imposed restrictions on the types of damages that a claimant could recover from an importer of foreign goods.

SUB-ISSUE B: In states where importers of foreign-made goods can be held strictly liable as though they manufactured the defective product, are there limits as to the type of damages that can be recovered from the importer?

SUB-ANSWER B: Yes. One state has specifically limited recoverable damages to compensatory damages.

DISCUSSION

Being able to hold importers of defective foreign-made products liable as manufacturers is critical to many individuals and families that have been harmed by defective, foreign-made products. Currently, Utah law does not allow for importers of foreign-made products to be held liable for injuries caused by defective products. As mentioned, H.B. 161 was introduced in an attempt to correct this legal defect. I will briefly discuss (I) a split between courts on whether importers of foreign products can be liable for damages caused by defective products and (II) the

statutory scheme that various states have enacted to provide victims of defective foreign-made products with an opportunity to be compensated for their harm.

I. WHILE UTAH COURTS HAVE REFUSED TO IMPOSE LIABILITY ON IMPORTERS, OTHER COURTS HAVE TAKEN THE OPPOSITE APPROCH.

As mentioned by you in your presentation of H.B. 161 to the House Business and Labor Committee, Utah has a recent case on point. In *Sanns v. Butterfield Ford*, a corrections officer and others ("Plaintiffs") brought suit against a local car dealership ("Butterfield") and an out-of-state car manufacturer ("Ford"). 94 P.3d 301, 303 (UT App. 2004). The Plaintiffs, in seeking to hold Butterfield liable for the entirety of the damages, argued that it was appropriate to hold Butterfield liable because they could then seek indemnification from Ford. *Id.* at 307. The Court of Appeals rejected this argument and explained that the Utah liability laws did not allow for holding parties jointly and severally liable for product defects. *Id.* Extrapolating this holding out, persons that are injured by defective foreign-made products are left without a way to be compensated for their loss.

Other courts have come to the opposite result in similar situations. For example, in *Godoy v. Abamaster of Miami, Inc.*, a woman ("Plaintiff") lost all four fingers on her right hand while using a foreign-made electric meat grinder. 754 N.Y.S.2d 301, 303 (2003). The plaintiff sued her employer, the retailer that sold the meat grinder, and the importer of the meat grinder. *Id.* The manufacturer of the meat grinder was a Taiwanese company and therefore not subject to the jurisdiction of the court. *Id.* The jury returned a verdict that the meat grinder was defective and that the defect was a substantial factor in causing the Plaintiff's harm. *Id.* at 305. Even though the retailer and importer had no idea the product was defective, the trial court held the retailer to be 50% liable for the harm and the importer 10% liable for the harm. *Id.* Citing New York law, the appellate court explained that persons liable for injuries by imputation "may seek

common-law indemnity from a person primarily liable for the injury." *Id.* at 306. The appellate court explained that "[o]f those in the chain of distribution, the distributor or importer closest to the manufacturer . . . is in the best position" to seek indemnification. *Id.* at 307. The appellate court reversed the trial court's decision to deny the retailers motion to dismiss and explained that the importer should be liable for the injuries. *Id.*

As illustrated by this case, not all claimants are stuck, as are those in Utah, with no recourse for harm that is caused by defective, foreign-made products. Individuals that are harmed in Utah are at a disadvantage. H.B. 161 would help to bring victims in Utah to an equal level with those in other states.

II. VARIOUS STATURY SCHEMES HAVE BEEN ENACTED TO ALLOW FOR IMPORTERS OF FOREIGN-MADE GOODS TO BE HELD LIABLE AS MANUFACTURERS.

As mentioned by the attorney from Ballard Spahr during the committee meeting where H.B. 161 was introduced, there are certain states that have jurisdictional requirements that must be satisfied before an importer can be held liable as a manufacturer. I will identify and discuss the statutes of a few (A) states that have jurisdictional requirements and (B) states that, similar to H.B. 161, do not have jurisdictional requirements.[1]

A. Multiple states require a showing that the manufacturer is not subject to the jurisdiction of the court before they will allow for importers of foreign-made goods to be held liable as though they were manufacturers.

Whatever their reason may be, some states have imposed jurisdictional prerequisites that must be satisfied before claimants are allowed to hold importers of foreign products liable as manufacturers. Essentially, claimants must prove that the actual manufacturer of the defective

[1] For the purpose of this memo, I will largely not address the specific ins-and-outs of each state's statute and how courts have interpreted the statutes. I will present summaries of the each statute and a quick explanation as to how the statute would act to hold an importer liable as though it manufactured the defective product.

foreign-made product is not subject to the court's jurisdiction. Because each state approaches the situation in a different way, I will give a brief description of each state individually.

1. In Ohio, importers may be held liable as manufacturers, but recovery is limited to compensatory damages.

In Ohio, non-manufacturers can be held liable as manufacturers in certain situations and with certain reservations. In order to hold an importer liable as a manufacturer, the claimant would have to show that an importer is a "supplier." Ohio Rev. Code. Ann. § 2307.78(B) (West). A supplier is broadly defined to include any "person that . . . participates in the placing of a product in the stream of commerce." Ohio Rev. Code Ann. § 2307.71(a)(i) (West). It appears that an importer falls within this definition.

Next, the claimant would have to show that "[t]he manufacturer of [the defective] product is not subject to judicial process in" Ohio. Ohio Rev. Code. Ann. § 2307.78(B)(1) (West). If the claimant can prove this, he can then recover against a supplier "as if it were the manufacturer of the product." Ohio Rev. Code. Ann. § 2307.78(B) (West). However, recovery is limited to compensatory damages. *Id.* Therefore, while an importer can be held liable for importing defective products, it cannot be liable for punitive damages like a manufacturer.

2. Indiana allows for importers to be held liable as though they were the manufacturers when the manufacturers are not subject to the court's jurisdiction.

In Indiana, holding an importer of defective, foreign-made products liable as a manufacturer is similar to Ohio. First, a claimant would have to establish that an Indiana "court is unable to hold jurisdiction over a particular manufacturer of a product . . . alleged to be defective." Ind. Code Ann. § 34-20-2-4 (West). Then, the claimant would have to establish that the importer was the "manufacturer's principal distributor or seller over whom a court may hold

jurisdiction." *Id.* If the plaintiff can meet both of these requirements, then the importer "shall be considered . . . the manufacturer of the product." *Id.*

A "seller" is defined as "a person engaged in the business of selling or leasing a product for resale, use, or consumption." Ind. Code Ann. § 34-6-2-136 (West). A plaintiff could fairly argue that an importer is in the business of selling the products it imports to a retailer for resale. "Distributor" is left undefined by applicable sections of the Indiana Code. However, other sections of the Indiana Code have broad definitions of distributor that generally include "every person that sells, barters, exchanges, or distributes" a product. *E.g.* Ind. Code Ann. § 6-7-1-6 (West); *see also* Ind. Code Ann. § 9-13-2-45 (West); Ind. Code Ann. § 15-16-2-10 (West); Ind. Code § 24-3-5-1.5 (West). Again, it seems like it is not a stretch to argue that an importer sells, barters, exchanges, or distributes a product. Principal is also not defined in the Indiana Code. However, from context is appears to mean "[c]hief; primary; [or] most important." PRINCIPAL, Black's Law Dictionary (9th ed. 2009). Therefore, it appears that importers, so long as they are the primary importer for that manufacturer within the jurisdiction of the court, can be held liable as manufacturers. It appears that, unlike Ohio, there is no statutory limit to damages.

3. The law in Kentucky appears to favor holding entities like importers liable for defective products.

While similar to Indiana and Ohio in that the court's jurisdiction over the manufacturer is relevant, Kentucky is different in that it appears to favor holding entities like importers liable for defective products over manufacturers. In Kentucky, it appears that an entity that is "a wholesaler, distributor or retailer" of defective products is liable as if it manufactured the defective products. Ky. Rev. Stat. A. § 411.340 (West).[2] An entity that qualifies as a

[2] The Kentucky Code does not define wholesalers, distributors and retailers, but it is arguable that an importer would fit at least one of these categories.

wholesaler, distributor or retailer can avoid liability by showing that the product's manufacturer is "subject to the jurisdiction of the court" and that the wholesaler, distributor or retailer did not alter the product or packaging in any way. *Id.* At that point, the manufacturer is liable for damages caused by the defective product, unless the wholesaler, distributor or retailer either knew of the defect or beached an express warranty. *Id.* Therefore, assuming that an importer would fit into the definition of a wholesaler, distributor or retailer, an importer would be the preferable defendant in Kentucky. However, like Indiana, it is not clear whether an importer in Kentucky would be liable for punitive damages.

B. Various states allow for importers of foreign-made goods to be held liable as manufacturers with no jurisdictional prerequisite.

Not all states require that the manufacturer be outside of the court's jurisdiction before holding importers liable as manufacturers. Again, as the states' approach is different in each state, I will address them individually.

1. Oregon appears to hold importers of goods strictly liable, but limits damages to compensatory damages.

In Oregon, anyone "who sells [] any product in a defective condition . . . is subject to liability for physical harm" when two specific conditions are met. Or. Rev. Stat. Ann. § 30.920(1) (West). First, the seller must be "engaged in the business of selling [the defective] product." Or. Rev. Stat. Ann. § 30.920(1)(a) (West). Second, the product must have reached the user or consumer "without substantial change in the condition in which it [was] sold." Or. Rev. Stat. Ann. § 30.920(1)(b) (West). Liability applies regardless of whether the seller "exercised all possible care" in the handling of the product. Because importers sell products to retailers, it is likely that they fall within the definition of anyone who sells a defective product.

It is possible that this statute was enacted to clarify any doubt the Supreme Court of Oregon left three years prior to the statute's enactment. *See McMullen v. Volkswagen of Am.*, 545 P.2d 117 (Or. 1976) (sitting en banc, holding that trial court erred by dismissing plaintiff's claims against the importer and distributor of an allegedly defective vehicle). However, while importers can be held strictly liable as manufacturers without any question as to jurisdiction, damages are limited to "physical harm or damage to property." Or. Rev. Stat. Ann. § 30.920(1) (West).

2. Maryland simply includes "importers" within its definition of manufacturer.

From the brief look I have taken at Maryland products liability law, it appears that products liability law is largely left to common law. However, the Maryland code does provide a definition of manufacturer for products liability claims. Md. Code Ann., Cts. & Jud. Proc. § 5-405(a)(2) (West). In Maryland, "'[m]anufacturer' includes an entity not otherwise a manufacturer that imports a product." Md. Code Ann., Cts. & Jud. Proc. § 5-405(a)(2)(ii) (West). This simple statutory scheme gives injured individuals recourse against importers of foreign products. However, it is not clear whether importers can be held liable for punitive damages like a manufacturer.

CONCLUSION

Courts are split as to whether an entity that imports foreign-made products can be liable as if the importer manufactured the defective product. States have created various statutory schemes whereby recovery can be allowed against importers of foreign-made products.

Allowing for claimants to recover where foreign-made products injure them is an important issue. In Utah, claimants injured by foreign-made products are left without recourse. H.B. 161 seeks to correct this defect in Utah law. While certain states have chosen to impose

jurisdictional findings prior to imposing liability on importers, other states have enacted legislation holding importers of foreign-made products strictly liable.